

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1929

No. 5111

792

ISABELLA V. LEAPLEY, PLAINTIFF IN ERROR,

vs.

JASON E. MATTHEWS.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5111.

ISABELLA V. LEAPLEY, Plaintiff in Error,

VS.

JASON E. MATTHEWS.

1 Municipal Court of the District of Columbia.

No. A-5696.

ISABELLA V. LEAPLEY, Plaintiff,

vs.

JASON E. MATTHEWS, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

2 *Declaration.*

(Filed November 14, 1928.)

The plaintiff, Isabella V. Leapley, sues the defendant, Jason E. Matthews, for money payable by the defendant to the plaintiff, for that heretofore, on, to wit, the 16th day of July, 1926, the defendant entered into a contract with one C. E. Leapley, who was and is the husband of the plaintiff, for the sale by the defendant to the said C. E. Leapley of certain real estate known as "The Matthews' Place, Tuxedo, Maryland", it being agreed, among other things in said agreement, that the said C. E. Leapley would pay to the defendant the sum of six thousand seven hundred

and fifty dollars (\$6,750.00) all cash, for said property, and it was further provided in said contract that "The title is to be good of record except as to covenants of record, if any", and it was further understood and agreed at the time said contract was entered into that the defendant was to convey the said property to the said C. E. Leapley, free and clear of all encumbrances whatsoever. That thereafter, on, to wit, the 19th day of August, 1926, the said C. E. Leapley being at that time confined to a hospital, the plaintiff, his wife, undertook to and did pay to the said defendant or his authorized agent, the sum of Six thousand six hundred ninety dollars and eighty-seven cents, (\$6,690.87), that being the total amount necessary to consummate said contract, at that time, and the defendant executed to and delivered to the plaintiff a deed for said property. That the plaintiff has since learned that there is, at the present time, an encumbrance against said real estate in the form of a mortgage or deed of trust in the sum of One thousand dollars (\$1,000.00) and that said encumbrance was against said property at the time of the consumation of said contract, namely, the 19th day of August, 1926, as set forth in the "Particulars of Demand" which is referred to and made a part hereof. That the plaintiff has made repeated demands upon the defendant for the payment by the defendant of the said encumbrance amounting to One thousand dollars (\$1,000.00), but the said defendant has utterly

3 failed and still fails and refuses to pay the same or any part thereof. Wherefore, the plaintiff brings this suit and claims of the defendant the sum of One thousand dollars (\$1,000.00), together with interest from August 19, 1926, as set forth in the "Particulars of Demand", besides costs of suit.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

Particulars of Demand.

(Filed November 14, 1929.)

Mortgage or deed of trust on real estate known as "The Matthews' Place, Tuxedo, Maryland", \$1,000.00, together with interest thereon from August 19, 1926.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

Pleas.

(Filed March 5, 1929.)

1. Now comes the defendant, Jason E. Matthews, by his attorneys and for plea to the declaration filed herein, says that he did enter into a written agreement with the said C. E. Leapley for the sale of the premises referred to, and that the sale of the said premises was subsequently consummated by the plaintiff herein, but denies that the agreement between C. E. Leapley and defendant herein contemplated payment of the entire purchase price to the defendant in cash, or that the said premises were to be conveyed by the defendant, herein free and clear of incumbrance, or that the plaintiff herein did pay to the defendant herein, or to his authorized agent as such, the full purchase price for the said premises.

2. And for a further plea, defendant, by his attorney, says that it was understood and agreed between parties at the time of the contract of sale, and of the settlement
4 thereunder, that the premises would be conveyed subject to an existing incumbrance, and that all expenses were to be adjusted to the date of transfer of the said premises, and that on the date of the transfer, the premises in question were conveyed to the plaintiff herein, subject to the unpaid balance of the existing incumbrance, which originally amounted to \$4,000; that the settlement of the sale of the said premises was made on this basis and that the defendant herein received personally a check for his equity in the said premises, the said check being in the amount of the agreed purchase price, less amounts chargeable against him under the terms of the said agreement, including the unpaid balance of the said incumbrance on the said premises and interest thereon, and the defendant denies that any additional amounts whatsoever were paid by the defendant herein, or anyone else in her behalf, on account of the transaction referred to in the said declaration, to him or to anyone else in his behalf.

(Signed)

FRANK M. STEPHEN,

(Signed)

A. LYLE HUGHES,

Attorney- for Defendant.

Joinder of Issue.

(Filed March 6, 1929.)

The plaintiff joins issue on the defendant's pleas.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

Finding.

(Min. 42, Page 184, June 7, 1929.)

Come now the parties hereto and thereupon this cause being heard and submitted the Court finds in favor of the defendant.

5

Motion for New Trial.

(Filed June 12, 1929.)

Now comes the plaintiff herein, by her attorneys, and moves the Court to grant a new trial in the above entitled cause for the following, among other reasons:

1. Because said finding of fact is contrary to the evidence.
2. Because said finding of fact is contrary to the weight of the evidence.
3. Because said finding of fact is contrary to the law.
4. For errors of law committed by the Justice presiding during the course of the trial.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

G. Lyle Hughes, Esq.,

Attorney for Defendant:

Please take notice that the foregoing motion will be called to the attention of the Court on the 19th day of June, 1929, at 10 o'clock A. M., or as soon thereafter as counsel may be heard.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

Service of a copy of the above received this 12th day of June, 1929.

(Signed)

G. LYLE HUGHES,
Attorney for Defendant.

Order of Court Extending Time to Hear Motion for New Trial.

(Min. 41, Page 353, June 19, 1929.)

It is by the Court ordered that the time within which to hear the plaintiff's motion for a new trial filed herein, be and the same is hereby extended to and including July 3, 1929.

Order of Court Extending Time to Hear Motion for New Trial.

(Min. 39, Page 380, July 3, 1929.)

Upon request of plaintiff the time within which to hear plaintiff's motion for a new trial of the above entitled cause is hereby extended for thirty days.

6 *Order of Court Extending Time to Hear Motion for New Trial.*

(Min. 42, Page 218, August 1, 1929.)

It is ordered that the time for hearing on the motion for a new trial, be and the same is hereby extended to and including sixty days from this date, August 1, 1929.

Motion for New Trial Overruled and Judgment.

(Min. 42, Page 219, August 26, 1929.)

Upon consideration of defendant's motion for a new trial it is ordered that said motion be, and the same is hereby overruled.

Further, it appearing under Rule of Court that judgment on the finding in this cause should be entered, it is so ordered. Wherefore it is considered that plaintiff take nothing by this action, defendant go hence without day, be for nothing held and recover of plaintiff his costs of defense.

Assignment of Errors.

(Filed November 19, 1929.)

The plaintiff, Isabella V. Leapley, hereby assigns the following errors to be presented on appeal of this case:

1. The Court erred in finding in favor of the defendant, because said finding is contrary to the evidence.

2. The Court erred in finding in favor of the defendant, because said finding is contrary to the law.

3. The Court erred in overruling the plaintiff's motion for new trial, because the finding of fact is contrary to the evidence, the weight of the evidence and the law.

4. The Court erred in giving its judgment in favor of the defendant, for the reason specifically referred to in the foregoing assignments.

(Signed)

WILLIAM F. KELLY.

(Signed)

P. J. J. NICOLAIDES.

7 In the Municipal Court of the District of Columbia.

A-5696.

ISABELLA V. LEAPLEY, Plaintiff,

VS.

JASON E. MATTHEWS, Defendant.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for trial before Judge Robert E. Mattingly, without a jury, on the 6th and 7th days of June, 1929, and on the issue made by the pleadings in this cause between the plaintiff and the defendant herein.

Whereupon the plaintiff, to maintain the issues on her part joined, offered as a witness **C. E. Leapley**, who testified that he was the husband of the plaintiff, and by occupation a truck farmer. That at about the middle of July, 1926 he saw the real estate in question advertised for sale in one of the Washington newspapers; that he called at the address given in the advertisement, which was on Sixth

Street, Northwest, just above L Street, and made inquiry concerning said real estate, and that he was informed that the gentleman who advertised the property for sale was not in. That he left his name and address, with the request that the gentleman who had the property for sale call and see him. That thereafter, a gentleman by the name of Harrison came to see him on the following Sunday at his home on Central Avenue in the City of Washington, District of Columbia, relative to the said real estate. That he had never seen or heard of Mr. Harrison before, nor had he had any business dealings with him whatsoever. That Mr. Harrison took him and his wife to see the real estate, which was located at Tuxedo, Maryland, and showed him over the property. That the defendant and his wife were present at that time. That thereafter, he entered into a written contract for the purchase of the real estate, which was introduced in evidence over objection of the defendant, the witness having identified his signature to the contract and the defendant having also identified his signature to the contract, and which was as follows:

8

Law Reporter Blank No. 263.

Law Reporter Printing Co., Washington, D. C.

“Sales Contract.

Official Standard Form Adopted by the Washington Real Estate Board, 1089-C.

“\$100.00.

Washington, D. C., July 15, 1926.

“Received from C. E. Leapley a deposit in the sum of One hundred 00/100 Dollars, to be applied as part payment of purchase price of $5\frac{3}{4}$ acres more or less of land with improvements thereon known as The Matthews place Tuxedo, Md., in the District of Columbia, as follows:

“Price of Property: Sixty seven hundred & fifty dollars.

“Terms of Sale: All Cash [secured by deed of trust constituting a first lien on the property hereby sold, in form customarily used in the District of Columbia secured by deed of trust constituting a second lien (subject only to the aforesaid first lien) on the property hereby sold, in form customarily used in the District of Columbia.]*

[*Words in brackets erased in copy.]

“Where trustees are to be named in a deed of trust or trusts, the said trustees are to be named by the party respectively secured thereby.

“The title is to be good of record except as to covenants of record, if any, or deposit is to be returned and sale declared off at option of the purchaser; but the seller and agent are hereby expressly released from all liability for damages by reason of any defect in title. In case legal steps are necessary to perfect title such action must be taken by the seller promptly at his own expense, whereupon the time herein specified for full settlement by purchaser will thereby be extended the period necessary for such prompt action.

“Rents, taxes, water rent, insurance and interest on existing incumbrances, if any, are to be adjusted to date of transfer. Taxes are to be adjusted according to certificate of taxes as issued by the Collector of Taxes of the [District of Columbia]* State of Md.; except that special improvements completed prior to date hereof, whether assessment therefor has been levied or not, shall be paid or proper allowance made therefor by the vendor at the time of the transfer.

9 “Examination of title, conveyancing, notary fees, and all recording charges, including those for purchase money trust, if any, are to be at the cost of the purchaser. Revenue stamps on deed to be paid by vendor, who shall execute to the purchaser the usual special warranty deed.

“The purchaser agrees to comply with the terms herein of sale within sixty days from the date of acceptance by owner, or the deposit will be forfeited, in which event one-half of said deposit shall be paid to ——— but the forfeiture of deposit shall not relieve the purchaser from responsibility of complying with terms of sale.

“This contract is made in Triplicate subject to the approval of owner and contains the entire agreement between the parties thereto.

By WILLIAM P. HARRISON,
Agent.

[*Words in brackets erased in copy.]

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale, and acknowledge it to be our contract.

C. E. LEAPLEY,
Purchaser.

J. E. MATTHEWS,
Owner.

Date: July 16th, '26. 1926."

That he paid the One hundred dollars (\$100.00) deposit provided for in said contract to the agent, Mr. Harrison. That he thereafter became ill, and was confined to a hospital, and nearly died, and remained under the doctor's care up until about November 1926. That he knew nothing more about the transaction until he and his wife moved into the property in the month of November 1926. That after they had moved into the property, and during the month of January 1927, a deed to the property was brought to the house by Mr. Harrison. That he looked at the deed at the time, but did not pay any particular attention to it. The deed was then introduced in evidence, the defendant and his wife having acknowledged their signatures to the same and admitting it was the deed for the property, and which deed was as follows:

10 Law Reporter Blank No. 80.

Law Reporter Ptg. Co., 518 Fifth St., Wash., D. C.

"Maryland Fee Simple Deed-Code—City or County, 709-C.

All Rights Reserved.

This deed, made this Nineteenth day of August, in the year of our Lord one thousand nine hundred and twenty-six, by and between Jason E. Matthews and Lillian Irene Matthews, his wife, as tenants by the entirety, of Tuxedo, Prince Georges' County, Maryland, parties of the first part, and Isabella V. Leapley, of Washington, D. C., party of the second part:

"Witneseth, that in consideration of Ten (\$10.00) dollars, Jason E. Matthews and Lillian Irine Matthews, his

wife, as tenants by the entirety, the said part- of the first part do grant and convey unto Isabella V. Leapley, party of the second part, her heirs and assigns, in fee simple, all that piece or parcel of ground situate, lying and being in Prince Georges' County, State of Maryland, being all of the same land which the said parties of the first part obtained from Roland Earl Sevier and Gladys Lorena Sevier, his wife, as joint Tenants, by deed dated the twenty fifth day of August 1924, recorded in the Land Records of Prince Georges' County in Liber 219 at folio 225 and being described as follows: to wit:

“Being part of the Wilmott tract and what is known now as part of “Whitlentine” more particularly described as follows: Beginning for same at a stone in the first line of Whitlentine, said stone being a boundry of Barnards, and running 1, South 22 degrees 15 minutes West 569.6 feet to a stone, one of Haffers Corners, then 2, North 59 degrees 13 minutes West 555.9 feet to a pipe, a corner of the tract surveyed off for Casbarian, then 3, North 22 degrees 58 minutes East 469 feet to a pipe on the West limits of the Shepherds branch railroad then 4, North 31 degrees 23 minutes West 79.3 feet to the first line of Whitlentine then 5, South 64 degrees 44 minutes East 610.3 feet to the beginning containing 5.74 acres of land exclusive of the railroad,
11 as per plat of survey made by Edward L. Latimer, Surveyor for Prince Georges' County, date July 25, 1907.

“Together, with the building and improvements thereupon, erected, made, or being; and all and every, the rights, alleys, ways, waters, privileges, appurtenances and advantages, to the same belonging or in anywise appertaining.

“To have and to hold the piece or parcel of ground and premises above described or mentioned, and hereby intended to be conveyed, together with the rights, privileges, appurtenances, and advantages thereto belonging or appertaining unto and to the only proper use, benefit and behoof forever of the said party of the second part, her heirs, or assigns.

“And the said parties of the first part covenant that they will warrant specially and generally the property hereby conveyed; that they are seized of the land hereby conveyed; that they have a right to convey said land; that the said party of the second part shall quietly enjoy said land; that

they have done no act to encumber said land; excepting, a first Mortgage for the amount of Four thousand dollars, as of record, and that they will execute such further assurances of said land as may be requisite.

“Witness their hands and seal.

LILLIAN IRENE MATTHEWS. [SEAL.]

JASON E. MATTHEWS. [SEAL.]

“Test:

G. HODGES CARR.

G. HODGES CARR.

“STATE OF MARYLAND,

County of Prince Georges, ss:

“I hereby certify that on this 20th day of August, 1926, before the subscriber, a Notary Public for Prince Georges’ Co., Md., personally appeared Jason E. Matthews and Lillian Irene Matthews, his wife, and did each acknowledge the foregoing Deed to be their act.

“In testimony whereof, I have affixed my official seal this 20th day of August, A. D. 1926.

G. HODGES CARR. [SEAL.]”

N. Public, Md.

12 (Indorsed on back:) “Deed, Aug. 30, 1926, 10:28, 29, A. M. From Jason E. Matthews and Lillian Irene Matthews, his wife, to Isabella V. Leapley. Received for record on the 30 day of Aug., A. D. 1926, at 10:23 o’clock A. M., and recorded in Liber No. 2744, at Folio 160, one of the Land Records for the Pr. Geo.’s Co. Md. S. D. Hall, Clerk. Wm. P. Harrison, 1105 6 St. N. W., Wash., D. C. Made and sold by the Law Reporter Printing Co., 518 Fifth St. N. W., Washington, D. C.”

Whereupon the plaintiff, to maintain the issues on her part joined, testified as follows: That she was at her home on Central Avenue, Northeast, in the City of Washington, on the occasion when Mr. Harrison called. That she and her husband went with Mr. Harrison to see the property located at Tuxedo, Maryland. That she had never before seen or heard of Mr. Harrison and that she had never had any business relations with him whatsoever. That after her husband had signed the contract to purchase the prop-

erty at Tuxedo, Maryland, that he became ill and was at death's door, and was confined to Providence Hospital. That she was at the hospital from early in the morning until late in the evening every day, during all of which time, she was in a highly nervous and worried condition. That she had contracted to sell the property which she owned together with her husband, on Central Avenue, Northeast, in the City of Washington, and that it was necessary for her

13 to consummate that contract in order to obtain money to complete the purchase of the property at Tuxedo, Maryland. That while her husband was in Providence Hospital, Mr. Harrison came to see her a couple of times. That Mr. Harrison was not acting for her in the sale of the property on Central Avenue in any manner whatsoever, and that she did not pay him in connection with the sale of the property, nor had she paid him anything, but that she did pay an entirely different agent, who had secured the contract for the sale of the Central Avenue property. That the sale of the Central Avenue property was settled by the Title Company. That Mr. Harrison knew it was necessary for her to complete the sale of the property on Central Avenue in order that she might complete the purchase of the property at Tuxedo, Maryland. That one evening when she was at Providence Hospital, Mr. Harrison came to the hospital and suggested that she go to dinner at his rooming house, which was conducted by a lady by the name of Mrs. Willingham. That she was in a highly nervous and excited condition and did not care to go, but, after Mr. Harrison insisted, she finally consented. That this was on the 19th of August, 1926. That she did go to Mr. Harrison's rooming house, and had dinner with Mr. Harrison and Mrs. Willingham. That after the dinner was over, they went into the front room, and Mr. and Mrs. Matthews were sitting there. That this was late in the evening, as it was just getting dark. That Mr. Harrison said they were going to complete the contract made by her husband for the purchase of the Tuxedo, Maryland, property, and that Mr. Harrison produced and prepared two (2) checks for her to sign, which the plaintiff signed and identified her signature thereto, which were received in evidence, and were as follows:

“No. —. Washington, D. C., Aug. 19th, 1926.

The Franklin National Bank.

3% on Savings,

Pay to the order of W. P. Harrison, Agt., \$3,589.20, Thirty-five hundred & eighty nine 20/100, Dollars.

Bal due to make settlement on place Tuxedo, Md.

ISABELLA V. LEAPLEY.”

14 Endorsed on back: “W. P. Harrison, Agt.”

On the face of check appears the following stamp:

P Aug. 20, 1926 T.

The check also bears the perforation: “Paid 8 20 26.”

“No. —. Washington, D. C., Aug. 19th, 1926.

The Franklin National Bank,

3% on Savings,

Pay to the order of Jason E. Matthews \$3,101.67, Thirty one hundred and one & 67/100 Dollars.

Payment in full purchase property at Tuxedo, Md.

ISABELLA V. LEAPLEY.”

Endorsed on back: “W. P. Harrison, J. E. Matthews, Jason E. Matthews.”

The check bears the perforation: “Paid 8 26 26.”

The witness testified that all of the writing on the face of the checks was in the handwriting of Mr. Harrison, except her signature. That nothing was said concerning any mortgage on the property whatsoever, and that she did not know at that time that there was a mortgage against the property. That there were no settlement figures made so far as she knew or submitted to her whatsoever but merely the two (2) checks for signature, and that she knew nothing whatsoever as to any arrangement that might have existed between Harrison and Matthews concerning Harrison's commission. That she had never seen a report on the title of the property, and had never received any certificate of title. That she was in a very nervous and worried state of

mind, and trusted Mr. Matthews that everything was being done properly. She further testified that after she had signed the checks, Mr. Harrison took them, and that closed the matter. She testified that she did not receive any deed to the property at that time, and did not receive any deed to the property until some time later in January, 1927. That they did not move into the property until November,

1926, as her husband was under the doctor's care up to that time. That some time in January, 1927, Mr.

Harrison brought her the deed. That she did not examine the same, but handed it over to her husband. That later on, about September, 1927, she learned from Mr. Thomas P. Hickman, of the Franklin National Bank, for the first time, that there was an encumbrance against the property at Tuxedo, Maryland, in the sum of One Thousand dollars (\$1,000.00). That she paid the interest due on the One Thousand dollars (\$1,000.00) to prevent the property from being foreclosed. That later on she took the matter up with her attorneys, and thereafter this suit was filed.

Whereupon the plaintiff rested.

The defendant then moved for directed verdict for the defendant, which motion was denied by the Court and exception noted thereto.

Whereupon the defendant, to maintain the issues on his part joined, offered as a witness **Mrs. Matthews**, who testified that she was the wife of the defendant and that Mr. Matthews was not at home on the first occasion when Mrs. Leapley called at Tuxedo, and that later when Mrs. Leapley again called, in response to a question by Mrs. Leapley, the witness told Mrs. Leapley of the mortgage on the place. That during the time Mr. Leapley was in the hospital, and prior to the settlement for the Tuxedo property, the witness and Mr. Matthews rode into town in Mr. Harrison's car with Mr. Harrison and Mrs. Leapley. That they were talking about Mrs. Leapley's money being tied up in the Central Avenue property, which Mrs. Leapley was selling, and that Mr. Harrison said that he was looking out for Mrs. Leapley and would not permit her to be beaten in that deal and that Mrs. Leapley said "Yes," that Mr. Harrison was helping her in the matter. That she was

present at the home of Mrs. Willingham on the occasion of the settlement of the property at Tuxedo, Maryland. That at that time, Mrs. Leapley was fully informed that there was an encumbrance on the property, and warned to see to it that it was paid off. That on that occasion, Mrs. Leapley stated that she knew there was an encumbrance on the property and that matter was going to be taken care of by Mr. Harrison. That on that occasion she saw her husband, Mr. Matthews, deliver the deed, which had formerly been offered in evidence, to Mrs. Leapley, and that the last she saw of the deed, it was in the possession of Mrs. Leapley.

16 Whereupon the defendant, to maintain the issues on his part joined, offered the deposition of **J. L. Sterling**, which had been previously taken, and who testified that he was cashier of The First National Bank of Leonardtown, Maryland. That some time in August, 1926, a gentleman by the name of Mr. Harrison came to the bank at Leonardtown, and paid off a trust on the property owned by Mr. and Mrs. Matthews, leaving a balance of One thousand dollars (\$1,000) still unpaid. That the interest on the balance of the mortgage had been paid by checks signed by Mrs. Leapley, the first payment being on September 17, 1927 in the sum of Sixty dollars (\$60.00), and two subsequent payments of semi-annual interest of Thirty dollars (\$30.00) each were made by check signed by Mrs. Leapley. That he had never seen or had any dealings with Mrs. Leapley.

Whereupon the defendant, to maintain the issues on his part joined, offered the deposition of **William P. Harrison**, which had been previously taken, and who testified, identifying his signature to the contract between the defendant and C. E. Leapley, and which had already been offered in evidence. He stated that he never knew Mrs. Leapley or had he had any business dealings with her until he went to the home of Mrs. Leapley about the property at Tuxedo, Maryland. That the contract between the defendant and C. E. Leapley was the contract that she consummated. That he had never had any previous business transactions with Mrs. Leapley. That he was only trying to help her in

a friendly way to close the deal on the sale of the property on Central Avenue Northeast. That he cashed the check payable to his order for Three thousand five hundred eighty-nine dollars and twenty cents (\$3,589.20), as it represented his commission in the sale, in the sum of approximately Three hundred dollars (\$300.00) and the amount of an unpaid mortgage on the Tuxedo, Maryland, property. That he went to Leonardtown, and that he did pay off all but One thousand dollars (\$1,000.00) of the mortgage, and that he intended paying that off later on, but that he did not do so. That he was paid a commission of five (5%) per cent by Mr. Matthews, which was the usual commission. That on the occasion when the settlement took place at the

17 home of Mrs. Wellingham, he made use of a rough statement in pencil, and that it was his impression that he gave it to Mrs. Leapley. That he further testified that he made out two (2) checks, which were signed by Mrs. Leapley, and that he gave one to Mr. Matthews and kept one himself. That he was under the impressions that a deed had been delivered to Mrs. Leapley by Mr. Matthews, but later on stated that he could not remember the deed passing. That he made arrangements with Mr. Matthews for the settlement as he was anxious for the matter to be settled in order that he could get his commission. That he was asked by the attorney for the defendant, who asked him to pay off the mortgage, and that he stated, "I have forgotten who asked me, but I was supposed to do it for Mrs. Leapley to pay this off in order to give a clear title.

Q. You meant to pay the mortgage off? A. Yes. She was paying cash for it."

"Q. Did she (meaning Mrs. Leapley) ever say anything to you about the unpaid balance on the mortgage? A. Well, I guess three or four months later. She was notified, I think, or somebody notified her that it had not been paid. There was a \$1,000 had (not?) been paid.

Q. Did she say anything to you about it? A. Yes, sir.

Q. What did she say? A. Well, let's see. I can't recollect now. I know I was notified, maybe five or six months later—I don't know just exactly how long it was.

Q. It couldn't have been more than five or six months, do you think? A. No, it couldn't have been any longer than that."

He further testified that in his relations with Mrs. Leapley, he was trying to help her out on account of her husband's misfortune, and acted in the capacity of a friend in doing those things for her.

Whereupon the defendant **Jason E. Matthews**, to maintain the issues on his part joined, testified that he was at the home of Mrs. Willingham on the evening of the settlement of the property located at Tuxedo, Maryland, and that to the best of his recollection it was about the 23rd of August, 1926. He explained that he fixed the date by the fact that he mailed check given him for his equity to his bank the next day after settlement, and that his bank statement showed the check credited to him on August 25, 1926.

18 That there had been at least two earlier appointments to make settlement but they were called off.

That settlement figures were prepared by Mr. Harrison and that there was some discrepancy between Mr. Harrison's figures and -is own, due to different methods of figuring interest on the mortgage on the premises. That he accepted Harrison's figures, which were more favorable to Mrs. Leapley, and settled on that basis. That Mrs. Leapley heard the conversation regarding the settlement and was fully informed that there was an encumbrance against the property, and specially warned her to be sure that the matter be taken care of; in fact, he testified that he distinctly remembered having called the matter to her attention at least twice, and she stated that Mr. Harrison was going to attend to the matter for her. That after the checks had been written by Mr. Harrison, that Mrs. Leapley signed them. That the check payable to his order for Three thousand one hundred one dollars and sixty-seven cents (\$3,101.67) represented his equity in the property, excluding the commission which he paid to Mr. Harrison for the sale of the property, which commission amounted to approximately Three hundred and fifty dollars (\$350.00), and which check was handed to him, and the other check payable to Harrison did not come into his hands. That on

the occasion of the settlement that evening, he had in his possession the deed to the property at Tuxedo, Maryland, being the same deed which had heretofore been introduced in evidence, and that he personally delivered the deed to Mrs. Leapley and that she folded it up and put it in her pocketbook. That the other check for Three thousand five hundred eighty-nine dollars and twenty cents (\$3,589.20) represented the balance due on the mortgage of approximately Three thousand two hundred and twenty-five dollars (\$3,225.00), together with Mr. Harrison's commission for the sale of the property, which commission had been included in the check with Mrs. Leapley's permission. He further testified that the deed to the property at Tuxedo, Maryland, was executed by him and his wife on the morning of August 20th, 1926, and that he took the deed to work with him that day and brought it home at night, keeping it for a couple of days thereafter, and finally took it with him to the home of Mrs. Willingham on the evening of settlement. He further testified that the first notice he
19 received that the encumbrance was unpaid on the Tuxedo, Maryland, property was in September 1928, when he received a letter from Mrs. Leapley's attorneys concerning the matter. He admitted that he had employed Mr. Harrison to procure a purchaser for the property, and paid him a commission in the amount of approximately Three hundred and fifty dollars (\$350.00).

Whereupon the defendant announced his case closed.

Whereupon the plaintiff, in rebuttal, to further maintain the issues on her part joined, offered as a witness **Mr. Harry Mercier**, who testified that he was assistant cashier of the Franklin National Bank. That he was handed the check, dated August 19, 1926, payable to the order of W. P. Harrison, Agt., in the sum of Three thousand five hundred eighty-nine dollars and twenty cents (\$3,589.20), and which had been previously introduced in evidence, and asked to state if he could tell when the check was paid by the Franklin National Bank. In response he stated that the check showed on its face that it had been paid on August 20, 1926. When asked to explain his answer, he stated that the check bore the stamp of the Franklin National Bank marked, "Paid, August 20, 1926", and that it had been put

United States of America, ss:

The President of the United States,

To the Honorable Robert E. Mattingly,

Judge of the Municipal Court of the District of Columbia,

GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between Isabel-
la V. Leapley, Plaintiff, and Jason E. Matthews, Defendant,

No. A-5696,

a manifest error hath happened, to the great damage of the said Plaintiff

as by her complaint appears.
We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable GEORGE E. MARTIN, Chief Justice
of the said Court of Appeals, the Eleventh day
of September, in the year of our Lord one thousand
nine hundred and twenty-nine.

Harry H. Hodges

Clerk of the Court of Appeals of the District of Columbia.

Allowed by

George E. Martin,

Chief Justice of the Court of Appeals of the District of Columbia.

in the perforation machine and was perforated as having been paid on August 20, 1926. That he was next asked if he had in his possession the original ledger sheet of the Franklin National Bank, of the account of Mrs. Isabella V. Leapley, in reply to which he answered that he had and identified the same. That he was next asked if that original ledger sheet showed an entry of a check in the sum of Three thousand five hundred eighty-nine dollars and twenty cents (\$3,589.20) and he answered that he did. The ledger sheet was then offered and admitted in evidence, and showed that there was an entry on August 20, 1926 of a check which had been received and paid in the sum of Three thousand five hundred eighty-nine dollars and twenty cents (\$3,589.20), and charged against her account, the foregoing being substantially all of the testimony offered.

Whereupon the plaintiff announced that her case was closed and asked the defendant for the sum of One thousand dollars (\$1,000.00), with interest, as prayed in the "Particulars of Demand".

20 The Court then announced its findings for the defendant.

Thereafter the plaintiff, through her attorneys, moved the Court to grant a new trial, as stated in said motion, which motion, over exception of the plaintiff, was overruled, and judgment was entered for the defendant on August 26, 1929.

All of the exceptions hereinbefore referred to were made when the rulings were made, and the plaintiff prays the Court to sign and seal this, its Bill of Exceptions, to have the same force and effect as if the rulings and exceptions thereto, herein contained were set out in separate bills of exception, which is accordingly done this 19th day of November, 1929, nunc pro tunc.

ROBT. E. MATTINGLY,
Judge.

(Here follows writ of error, marked page 21.)

22 *Order of Court Extending Time to Submit Bill of Exceptions.*

(Min. 46, Page 102, October 10, 1929.)

Upon request of Plaintiff the time within which to submit the Bill of Exceptions is hereby extended for thirty days.

Order of Court Extending Time to Submit Bill of Exceptions.

(Min. 42, Page 249, November 7, 1929.)

It is ordered that the time for submitting the Bill of Exceptions in this cause be and the same is hereby extended to and including fifteen days from date.

Submission and Signing of Bill of Exceptions.

(Min. 42, Page 263, November 19, 1929.)

Come now the parties hereto by their respective attorneys of record, wherefore the bill of exceptions taken at the trial of this cause, is submitted to the court to be settled.

Further, the Court, having this day signed the bill of exceptions taken at the trial of this cause, and heretofore submitted, now hereby orders the same of record nunc pro tunc.

Designation of Record.

(Filed November 19, 1929.)

The Clerk, in making up the transcript of record on appeal in this case, will include therein:

1. Declaration, Particulars of Demand, Pleas of the Defendant and Joinder of Issue.
2. Memorandum of Finding.
3. Motion for New Trial.
4. Memorandum of Court extending time, within which to hear Plaintiff's Motion for New Trial.
5. Memorandum of Court overruling Motion for New Trial, and judgment thereon.
6. Assignment of Errors.
7. Memorandum of Court extending time, within which to submit Bill of Exceptions.
- 23 8. Memorandum of Submission of Bill of Exceptions.
9. Memorandum of Court signing Bill of Exceptions and making same part of record.

10. Bill of Exceptions.

11. Designation of Record.

(Signed)

WILLIAM F. KELLY,

(Signed)

P. J. J. NICOLAIDES,

Attorneys for Plaintiff.

Service of a copy of the foregoing Designation or Record in the above case is this 19th day of November, 1929, hereby acknowledged.

(Signed)

G. LYLE HUGHES,

Attorney for Defendant.

Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 23, both inclusive, to be a true and correct transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. A-5696, wherein Isabella V. Leapley, is plaintiff, and Jason E. Matthews, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 5th day of December, 1929.

[Seal Municipal Court District of Columbia.]

BLANCHE NEFF,

Clerk.

Endorsed on cover: District of Columbia Municipal Court. No. 5111. Isabella V. Leapley, plaintiff in error, vs. Jason E. Matthews. Court of Appeals, District of Columbia. Filed Dec. 5, 1929. Henry W. Hodges, Clerk.

FEB 13 1930

Henry M. Hodges
CLERK.

Court of Appeals
OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1929

No. 5111

ISABELLA V. LEAPLEY,
Plaintiff in Error,

vs.

JASON E. MATTHEWS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Plaintiff in Error.

Court of Appeals
OF THE DISTRICT OF COLUMBIA

No. 5111

ISABELLA V. LEAPLEY,
Plaintiff in Error,

vs.

JASON E. MATTHEWS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

GENERAL STATEMENT OF CASE

This action was instituted by the plaintiff in error, whom we shall hereafter call the plaintiff, in the Municipal Court, to recover from the defendant in error, whom we shall hereafter call the defendant, the sum of \$1,000.00, being the amount claimed to be due her because of a mortgage of that amount upon a piece of real estate purchased by her from the defendant.

The declaration contained one count, setting forth that the plaintiff's husband had contracted with the defendant to purchase certain property for the sum of \$6,750.00, all cash, and that thereafter, the said contract was consummated by the plaintiff paying the purchase price in cash, but later she learned that there was an encumbrance against the property in the sum of \$1,000.00 and asked that she be given judgment against the defendant for that amount of money.

The defendant filed two pleas, the first of which denied that the agreement between the plaintiff's husband and the defendant contemplated payment of the entire purchase price in cash, or that the premises were to be conveyed by the defendant, free and clear of encumbrance, or that the plaintiff did pay to the defendant, or his authorized agent, full purchase price of said premises. Plea No. 2 was an affirmative plea, reciting that the parties agreed, at the time of the signing of the contract, as well as at the settlement thereof, that the premises would be conveyed subject to an existing encumbrance, and that the premises were conveyed to the plaintiff, subject to an unpaid encumbrance, and settlement made upon that basis, the defendant receiving a check for his equity in the premises, no additional amount being paid by the plaintiff to him or anyone else in his behalf.

II

STATEMENT OF THE EVIDENCE

The substance of the evidence, as introduced at the trial, was as follows:

(a) C. E. Leapley, a truck farmer and husband of the plaintiff, testified that:

About the middle of July, 1926, he saw the real estate in question advertised for sale in a local newspaper, whereupon he called at the address given therein which was on Sixth Street, Northwest, just above L Street, and was informed that the gentleman advertising the property was not in. He left his name and address for the gentleman to call and see him, and thereafter, a man by the name of Harrison came to see him at his home on Central Avenue, Northeast, in the City of Washington, District of Columbia, relative to the property. He had never seen or heard of Harrison before, nor had he had any business dealings with him whatsoever. Harrison took him and his wife to see the property, which was located at Tuxedo, Maryland. The defendant and his wife were present at the time. Thereafter, he entered into a written contract for the purchase of the property for the sum of \$6,750.00, all cash, and put up a deposit of \$100.00, the contract being offered and accepted in evidence (a copy of the contract will be found in the record on page 7 and will be referred to hereafter). Later he became very ill and was confined to a hospital and nearly died, remaining under the doctor's care until November, 1926. That he knew nothing more about the transaction until he and his wife moved into the property in November, 1926. In January, 1927, a deed to the property was brought to the house by Harrison, which he looked over but did not pay particular atten-

tion to, which deed was introduced in evidence (a copy of the deed is found in the record on page 10 and will be referred to hereafter).

(b) Mrs. Isabella V. Leapley, the plaintiff, testified that:

She was at her home on Central Avenue, Northeast, in the City of Washington, District of Columbia, on the occasion when Harrison called. She and her husband went with Harrison to see the property at Tuxedo, Maryland. She had never before seen or heard of Harrison and that she had never had any business relations with him whatsoever. After her husband had signed the contract, he became ill and was at death's door, and was confined to Providence Hospital. She was at the hospital from early in the morning until late in the evening every day, during all of which time, she was in a highly nervous and worried condition. She had contracted to sell the property, which she owned together with her husband, on Central Avenue, Northeast, and it was necessary for her to consummate that contract in order to obtain money to complete the purchase of the property at Tuxedo, Maryland. While her husband was in the hospital, Harrison came to see her a couple of times. Harrison was not acting for her in the sale of the property on Central Avenue in any manner whatsoever, although he knew that it was necessary for her to complete that sale in order that she might complete the purchase of the property at Tuxedo, Maryland, and she did not pay him anything in connection with the sale of the Central Avenue property, but she did pay an entirely different agent who had secured the contract for the sale of the Central Avenue property. The sale of the Central Avenue property was settled by a title company. One evening when she was at the hospital Harrison came and suggested that she have dinner with him and

Mrs. Willingham at their home. She was in a highly nervous and excited condition and did not care to go, but upon the insistence of Harrison, she consented. This was on the 19th of August, 1926. After the dinner was over, they went into the front room, and Mr. and Mrs. Matthews were sitting there. This was late in the evening, as it was just getting dark. Harrison then stated that they were going to complete the contract made by her husband for the purchase of the Tuxedo, Maryland, property, and that Harrison produced and prepared two checks for her to sign, which she did sign and identified her signature thereto, and which were received in evidence (copies of the checks are found in the record on page 13 and will be referred to hereafter).

She testified that all of the writing on the face of the checks was in the handwriting of Harrison, except her signature. She further stated that nothing was said concerning any mortgage on the property, and that she did not know at the time that there was a mortgage against the property. There were no settlement figures submitted and she knew nothing whatsoever as to any arrangement that might have existed between Harrison and Matthews concerning Harrison's commission. She had never seen a report on the title of the property, and had never received any certificate of title. She was in a very nervous and worried state of mind, and trusted Mr. Matthews that everything was being done properly. She stated that after she had signed the checks, Harrison took them, and that closed the matter. She did not receive any deed to the property at that time, and did not receive any deed to the property until some time later in January, 1927. She did not move into the property until November, 1926, as her husband was under the doctor's care up to that time. Some time in January, 1927, Harrison brought her the deed, but she did not examine it but handed it

over to her husband. Later on, about September, 1927, she learned from Mr. Thomas P. Hickman, of the Franklin National Bank, for the first time, that there was an encumbrance against the property at Tuxedo, Maryland, in the sum of \$1,000.00. That she paid the interest due on the \$1,000.00 to prevent the property from being foreclosed and later on, took the matter up with her attorneys, and thereafter this suit was filed.

The foregoing being substantially all the testimony offered in chief by the plaintiff.

(c) Mrs. Matthews, the wife of the defendant, testified that:

Her husband, Mr. Matthews, was not at home on the first occasion when Mrs. Leapley called at Tuxedo, and that later when Mrs. Leapley again called, in response to a question by Mrs. Leapley, she told Mrs. Leapley of the mortgage on the place. During the time Mr. Leapley was in the hospital, and prior to the settlement, that she, together with her husband and Mrs. Leapley, rode into town in Harrison's car with Harrison. They were talking about Mrs. Leapley's money being tied up in the Central Avenue property and that Harrison stated that he was looking out for Mrs. Leapley and would not permit her to be beaten in the deal and that Mrs. Leapley said "Yes," that Mr. Harrison was helping her in the matter. She was present at the home of Mrs. Willingham on the occasion of the settlement of the Tuxedo property, and Mrs. Leapley was fully informed that there was an encumbrance on the property, and warned to see that it was paid off. On that occasion, Mrs. Leapley stated that she knew there was an encumbrance on the property and that it was going to be taken care of by Mr. Harrison, and she saw her husband deliver the deed

for the property to Mrs. Leapley, and the last she saw of the deed, it was on that occasion when it was in the possession of Mrs. Leapley.

(d) The deposition of J. L. Sterling, which had previously been taken, was offered, on behalf of the defendant, and was substantially as follows:

That he was cashier of The First National Bank of Leonardtown, Maryland, and that in August, 1926, a gentleman by the name of Harrison came to the bank and made a payment upon a trust on the property owned by the Matthews, leaving a balance of \$1,000.00 still unpaid. That the interest on the balance of the mortgage had been paid by checks signed by Mrs. Leapley, the first payment being on September 17, 1927, in the sum of Sixty dollars (\$60.00), and two subsequent payments of semi-annual interest of Thirty dollars (\$30.00) each were made by check signed by Mrs. Leapley. That he had never seen or had any dealing with Mrs. Leapley.

(e) The deposition of William P. Harrison, which had previously been taken, was offered, on behalf of the defendant, and was substantially as follows:

He identified his signature to the contract between the defendant and C. E. Leapley, which had already been offered in evidence, and stated that he never knew Mrs. Leapley or had he had any business dealings with her until he went to her home about the Tuxedo, Maryland, property. That the contract between the defendant and C. E. Leapley was the contract that she consummated. That he had never had any previous business transactions with Mrs. Leapley and was only trying to help her in a friendly way to close the deal on the Central Avenue property. That he cashed the check payable to his order for \$3,589.20,

as it represented his commission on the sale, in the sum of approximately \$300.00 and the amount of an unpaid mortgage on the Tuxedo, Maryland, property. That he went to Leonardtown and did pay off all but \$1,000.00 of the mortgage, and he intended paying that off later, but did not do so. That he was paid a commission of five (5%) per cent by Mr. Matthews, which was the usual commission. That on the occasion when the settlement took place at the home of Mrs. Willingham, he made use of a rough statement in pencil, and that it was his impression that he gave it to Mrs. Leapley. He further stated that he made out two (2) checks, which were signed by Mrs. Leapley, and that he gave one to Mr. Matthews and kept one himself. That he was under the impression that a deed had been delivered to Mrs. Leapley by Mr. Matthews, but later on stated that he could not remember the deed passing. That he made arrangements with Mr. Matthews for the settlement as he was anxious for the matter to be settled in order that he could get his commission. He was asked by the attorney for the defendant, who asked him to pay off the mortgage, in reply to which, he stated: "I have forgotten who asked me, but I was supposed to do it for Mrs. Leapley to pay this off in order to give a clear title."

"Q. You meant to pay the mortgage off? A. Yes. She was paying cash for it."

He was further questioned concerning the unpaid balance of the mortgage and if he had ever said anything to Mrs. Leapley about it, but his testimony in this respect, according to the record (record page 16), is very confusing. He further stated that in his relations with Mrs. Leapley, he was trying to help her out on account of her husband's misfortune, and acted in the capacity of a friend in doing those things for her.

(f) Mr. Jason E. Matthews, the defendant, testified:

That he was at the home of Mrs. Willingham on the evening of the settlement of the Tuxedo, Maryland, property, and that to the best of his recollection it was about August 23, 1926, and that he fixed the date by the fact that he mailed the check given him for his equity to his bank the next day after settlement, and that his bank statement showed the check credited to him on August 25, 1926. That there had been at least two earlier appointments to make settlement but they were called off. The settlement figures were prepared by Harrison and that there was some discrepancy between Harrison's figures and his own, due to different methods of figuring interest on the mortgage on the premises, but that he accepted Harrison's figures, which were more favorable to Mrs. Leapley, and settled on that basis. That Mrs. Leapley heard the conversation regarding the settlement and was fully informed that there was an encumbrance against the property, and specially warned her to be sure that the matter was taken care of. He distinctly remembered having called the matter to her attention at least twice, and she stated that Harrison was going to attend to the matter for her. After the checks were written by Harrison, Mrs. Leapley signed them. The check payable to his order for \$3,101.67 represented his equity in the property and did not include the commission amounting to approximately \$350.00 due by him to Harrison for the sale of the property, and the other check payable to Harrison and including his commission did not come into his hands. That on the evening of the settlement he had in his possession the deed to the Tuxedo, Maryland, property, being the same deed which had heretofore been introduced in evidence, and that he personally delivered the deed to Mrs. Leapley and that she folded it up and put it in her pocketbook. The other check for \$3,589.20 represented the balance

due on the mortgage of approximately \$3,225.00, together with Harrison's commission for the sale of the property, which commission had been included in the check with Mrs. Leapley's permission. He further testified that the deed to the property at Tuxedo, Maryland, was executed by him and his wife on the morning of August 20, 1926, and that he took the deed to work with him that day and brought it home at night, keeping it for a couple of days thereafter, and finally took it with him to the home of Mrs. Willingham on the evening of settlement. He further testified that the first notice he received that the encumbrance was unpaid on the Tuxedo, Maryland, property was in September, 1928, when he received a letter from Mrs. Leapley's attorneys concerning the matter. He admitted that he had employed Mr. Harrison to procure a purchaser for the property, and paid him a commission in the amount of approximately \$350.00.

The foregoing being substantially all the testimony offered by the defendant.

(g) Mr. Harry Mercier testified, on rebuttal, that: He was assistant cashier of the Franklin National Bank. He was handed the check, dated August 19, 1926, payable to the order of W. P. Harrison, Agt., in the sum of \$3,589.20, being the same check which is in the record, page 13, and was asked to state if he could tell when the check was paid by the Franklin National Bank. He stated that the check showed on its face that it had been paid on August 20, 1926, and explained his answer by stating that the check bore the stamp of the Franklin National Bank marked, "Paid, August 20, 1926," and that it had been put in the perforation machine and was perforated as having been paid on August 20, 1926. He was then asked if he had in his possession the original ledger sheet of the Franklin National Bank, of the account of Mrs. Isabella V.

Leapley, in reply to which he answered that he had and identified the same. He was next asked if that original ledger sheet showed an entry of a check in the sum of \$3,589.20 and he answered that it did. The ledger sheet was then offered and admitted in evidence, and showed that there was an entry on August 20, 1926, of a check which had been received and paid in the sum of \$3,589.20, and charged against Mrs. Leapley's account.

III

ASSIGNMENT OF ERRORS

1. The Court erred in finding in favor of the defendant, because said finding is contrary to the evidence.

2. The Court erred in finding in favor of the defendant, because said finding is contrary to the law.

3. The Court erred in overruling the plaintiff's motion for new trial, because the finding of fact is contrary to the evidence, the weight of the evidence and the law.

4. The Court erred in giving its judgment in favor of the defendant, for the reason specifically referred to in the foregoing assignments.

IV

ARGUMENT

It is respectfully contended that the Court below erred in two main respects, first, it erred in entering a finding for the defendant, and second, it erred in entering judgment in favor of the defendant, for upon

all the evidence the court should have found in favor of the plaintiff, and entered judgment accordingly.

It will be seen from the evidence, as set forth here, as well as that contained in the record, that what actually happened was Harrison, the man employed by the defendant to sell the real estate, was entrusted with the money to pay off the mortgage on the Tuxedo, Maryland, property, and that instead of doing so, he kept \$1,000.00 thereof, or to put it more strongly, he appropriated the sum of \$1,000.00 to his own use. The question which this situation presents is very simple, that is, whose money did Mr. Harrison steal? If he stole the plaintiff's money, of course the defendant is not liable, but, on the other hand, if he stole money belonging to the defendant, Mr. Matthews, then of course Mr. Matthews is liable to the plaintiff for that amount, as the plaintiff has paid the full amount of the purchase price. To put it another way, the question involved is one of agency, that is, for whom was Harrison acting when he went to pay off the mortgage? It is contended, the finding and judgment are in error, for the reason that it is very clear that the witness, Harrison, appropriated the money belonging to the defendant, and that the said Harrison was acting for the defendant at the time he went to pay off the mortgage.

In order to first determine the duties of the respective parties to the contract, it is of course important to look to the contract itself. It will be noted that the original contract of purchase, between C. E. Leapley and the defendant, provided that the price of the property was \$6,750.00 and that the terms of sale were all cash. It will be noted that the wording relative to encumbrances was scratched out in the contract (Rec. p. 7). This phraseology can mean only one thing and that is that the purchaser was obligated to pay to the

seller the sum of \$6,750.00 and that having done that, she was entitled to receive the property free and clear of all encumbrance. On the other hand, the obligation of the seller, and one which he cannot shift to the purchaser, was to see that the purchaser received the property free and clear of all encumbrance.

The testimony shows that the plaintiff did pay the entire purchase price in cash, as represented by the two (2) checks dated August 19, 1926, one of which was payable to W. P. Harrison, Agent, and the other to Jason E. Matthews (Rec. p. 13). At this point, it is interesting to note that the check payable to the order of Jason E. Matthews bears the endorsement of W. P. Harrison (Rec. p. 13).

The testimony further shows that the check which was payable to Harrison, as agent, included not only the amount which was necessary to pay off the mortgage, but also the commission which the defendant was obligated to pay Harrison (Rec. p. 16), showing conclusively that the money, represented by the check, was Mr. Matthews' money and not the money of Mrs. Leapley, as she had nothing to do with the commission and was not obligated to pay anything to Harrison.

There is no doubt, and it is not contended to the contrary, that the witness, Harrison, was in the beginning and up to the time of settlement, the agent for the defendant in the transaction, and if he were performing his duties as an agent should perform them, he was working for the interest of his principal, the defendant, Matthews. The position taken by the defendant is that Harrison was his agent to sell the property and he paid him a commission for selling the property, but when the time came to pay the mortgage, he ceased being his agent and became the agent of Mrs. Leapley, that because Harrison was friendly to

her, he became her agent. Surely such a position is untenable and not justified by the evidence in this case. The testimony of Harrison in this connection was that in his relations with Mrs. Leapley he was trying to help her on account of her husband's misfortune and acted in the capacity of a friend (Rec. p. 17) and it will be seen that the assistance, if any, Harrison rendered Mrs. Leapley, in connection with the Central Avenue property, was for the purpose of making available to her, the money necessary to consummate the contract for the Tuxedo, Maryland, property so that he would receive his commission from Matthews on that sale (Rec. p. 16). At most the testimony of the defendant as to what transpired at the time of settlement, is merely to the effect that on that occasion he informed Mrs. Leapley that there was a mortgage on the property and warned her to see that it was paid off, and that she stated Mr. Harrison was going to attend to the matter for her.

There is no evidence that the contract of sale was abandoned, on the contrary, Harrison testified the contract between the defendant and C. E. Leapley was the contract the plaintiff consummated (Rec. p. 15). Both parties were obligated to consummate. For this purpose the vendee's wife met the vendor and his agent to make the settlement under the contract, no doubt because her husband was then supposed to be dying in a hospital. There is no evidence of any other variance of the contract. Checks for the settlement were written by the vendor's agent as they wanted them and Mrs. Leapley signed them. One was for the amount the vendor would realize from the property and the other for the amount of the encumbrance and the agent's commission and was made payable to the agent. From this it is argued that Mrs. Leapley made Harrison her agent to pay off the encumbrance. But the vendor had requested that the check be executed that way and he

was still obligated to deliver a clear title. This obligation would not have been altered had Mrs. Leapley paid the full purchase price to the vendor, nor is it altered by the fact that at the vendor's request she entrusted part of it to the agent that he might attend to the taking up of the encumbrance. The taking up of the encumbrance was the vendor's duty under the contract and the doing thereof was for the vendor. There is no evidence that Mrs. Leapley agreed to assume the mortgage and herself pay it off. At most the evidence only shows that she was trustful, but that trustfulness did not constitute a waiver of the vendor's obligation to deliver clear title nor constitute Harrison her agent. She trusted Harrison as the agent of the vendor; that is all that can be fairly inferred from her statement when the encumbrance was mentioned that "Mr. Harrison will attend to that for me." She trusted Harrison as agent of Matthews to see she got clear title. That did not make Harrison her agent.

Even taking the testimony of the defendant's own witness, Harrison, there can be no doubt that it was the duty of the defendant to see that the mortgage was paid off, as he states, "I have forgotten who asked me, but I was supposed to do it for Mrs. Leapley to pay this off in order to give a clear title. Q. You meant to pay the mortgage off? A. Yes. She was paying cash for it." (Rec. p. 16.) This testimony is significant as it shows very clearly that the defendant Matthews was to *give* a clear title, as Mrs. Leapley was *paying cash* for the property, and the word *give* further shows that Harrison was acting for Mr. Matthews and not Mrs. Leapley, as, had he been acting for Mrs. Leapley, he would have used the word *receive* rather than *give*.

When the plaintiff signed the check payable to the order of Harrison as agent, it became the money of Matthews in the hands of his agent, and even if the

plaintiff had given directions about what to do with it, such directions could have no legal force or effect. The payment of the money to the seller's agent was payment to the seller.

There can be no doubt that the payment by the plaintiff, of part of the purchase price of the real estate, to the selling agent of the defendant, by way of a check payable to Harrison as agent, was payment in fact and in law to the defendant, the seller, and if as contended by the defendant, but denied by the plaintiff, the plaintiff did then consent to said agent paying the existing encumbrance on said real estate with said money, it is the same in fact and in law as though she had paid all of the money direct to the seller, the defendant, and made request of him to immediately pay the existing encumbrance on the real estate, and he had neglected, omitted and refused to do so.

The defendant lays particular stress upon the deed which he alleges was delivered to the plaintiff at the time of settlement and contained the following phraseology: "That they have done no act to encumber said land: excepting a first mortgage for the amount of \$4,000.00, as of record" (Rec. p. 10 and 11).

Aside from the fact that while the deed recited an encumbrance of \$4,000.00 and the actual encumbrance on the property was only \$3,225.00, therefore forming no guide as to the actual amount of encumbrance, Mrs. Leapley denied having received the deed at the time of settlement, and on the contrary stated that she did not receive any deed to the property at that time, and did not receive any deed to the property until some time later in January 1927, when Harrison brought her the deed (Rec. p. 14), and it is important to note in this connection that while the defendant testified

that he delivered the deed to the plaintiff on the evening of the settlement, the evidence shows that this was a physical impossibility, and therefore his statement in this respect could not be true. Mrs. Leapley testified that the settlement was made on the evening of August 19, 1926 (Rec. p. 12). Substantiating this statement is the fact that the settlement admittedly took place in the evening, and that the check payable to Harrison as agent, dated August 19, 1926, was actually cashed by the Franklin National Bank on August 20, 1926 (Rec. p. 18 and 19), so the fact is established that the settlement took place *prior* to August 20, 1926. With this fact definitely established, we next look to the deed itself, and we find that it was executed in Maryland on the 20th of August, 1926 (Rec. p. 18), acknowledged on the same day (Rec. p. 11), and by the defendant's own statement, kept in his possession all of that day and all of that night and a couple of days thereafter (Rec. p. 18), so we find that it was a physical impossibility for the defendant to have delivered the deed to the plaintiff at the time of settlement as it was not then in existence, having been neither executed nor acknowledged at that time. The defendant being thus in error, relative to the delivery of the deed to the plaintiff at the time of settlement, his testimony, as to his statements on that occasion, attempted to shift his responsibility under his contract, is entitled to no credence.

Finally we desire to call the Court's attention to the case of *Babson vs. Cox*, 32 Appeals D. C. 542, as it will be seen from the opinion, together with transcript of the record that almost the identical situation existed there as exists in this case, in that the plaintiff contracted to buy certain real estate and pay a certain amount of cash, and did pay the required amount of cash to the agents of the owner, and received a deed for the property.

Thereafter it was learned that there was an encumbrance on the property of approximately \$2,000.00. In that case, as in this case, the plaintiff had read an advertisement, by the agents, and had gone to see him as a result thereof. In that case, as in this case, the defendant claimed that the agent who negotiated the sale became the agent of the purchaser for the purpose of paying off the mortgage, and that therefore the plaintiff would have to suffer on account of the act of a dishonest agent. The Court, in delivering its opinion, stated as follows:

"The first contention of the appellant is that Martin Brothers, were, in fact, the agents of the plaintiff, and not of the defendant, in the sale. That is without foundation. Plaintiff called on them to purchase property if he could find any that suited him, in their hands for sale. That the property was not then under their agency is immaterial. They saw defendant, and obtained his authority to make the sale. They entered into a written contract with the purchaser, executing it as agents of the seller, who expressly approved the same. The defendant's mother, whom he represented, executed the deed in accordance with the contract, and sent it to the agent for delivery to the purchaser. After the conclusion of the sale, defendant paid the agents the usual commission. The agents, having closed the sale in strict conformity with the terms of the contract and being intrusted with the deed for delivery, had the power to receive the agreed consideration. Peck v. Harriott, 6 Serg. & R. 149 9 Am. Dec. 415; Morrill vs. Cone, 22 How. 75-81-16 L. ed 253-255.

"It is further contended that, notwithstanding-

ing Martin Brothers may have been the agents of the seller, empowered as aforesaid, the purchaser made them his agents for the purpose of discharging the encumbrance out of the purchase money. The testimony does not sustain this contention. By the terms of the special warranty it is the duty of the seller to discharge this encumbrance, and, while the purchaser may have been careless in not seeing that it was in fact done before making payment, he had the right to rely on the warranty and was under no obligation to see to the appropriation of his money thereto by the defendant's agents. The defendant was more negligent. He knew that there was a warranty against the encumbrance, and that it was the duty of the seller to discharge it. He took the word of the fraudulent agents that the encumbrance had been paid out of the purchase money, and, without inquiry paid their commissions and received the remainder of the money. It being his duty to see that the encumbrance was actually discharged, he must suffer the consequences of his misplaced confidence in the agents."

CONCLUSION

The ultimate question involved herein is for whom did Harrison act at the time of settlement in receiving the check made payable to himself as agent, and whose obligation, concerning the mortgage, was he to discharge? If he was acting for the plaintiff, then of course she has no right of action, but if, on the other hand, he was acting for the defendant, then the latter is liable to the plaintiff. The obligation of the purchaser, the plaintiff herein, was to pay the sum of \$6,750.00 all cash, while the obligation of the seller,

the defendant herein, was to give title to the plaintiff, free and clear of all encumbrance. The purchaser, the plaintiff herein, has paid the sum of \$6,750.00 all cash, but the seller, the defendant herein, has failed to deliver a title, free and clear of all encumbrance. The defendant cannot, by a few words, divest himself of his obligations and throw the burden upon the plaintiff to see that that is done which he is both legally and morally obligated to do. There can be no doubt that Harrison was the agent of the seller and in the entire transaction was acting for the seller's benefit, first, in advertising the property for sale, second, in securing a contract, and third, in seeing that the contract was consummated, and when the check in the sum of \$3,589.20 was made payable to W. P. Harrison, agent, it was in fact and in law a payment by the purchaser to the seller and she had thereupon completed the obligation imposed by the contract; and it is too late, after the seller's admitted agent has appropriated part of the purchase money to his own use, to say that it is no concern of the seller's as his agent was then acting for the purchaser, and we respectfully submit that the lower Court erred in entering a finding for the defendant and in entering judgment for the defendant, and that said judgment of the Court below, in favor of the defendant, should be reversed.

WILLIAM F. KELLY,
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Attorneys for Plaintiff in Error.

MAR 13 1930

Court of Appeals *Henry H. Hodges*
CLERK.
OF THE DISTRICT OF COLUMBIA

October Term, 1929

No. 5111

ISABELLA V. LEAPLEY,

Plaintiff in Error,

vs.

JASON E. MATTHEWS,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

FRANK M. STEPHEN,

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BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF FACTS

The facts as adduced by the defendant in the trial below were, briefly:

That the defendant employed one Harrison to procure a purchaser for certain property in Tuxedo, Maryland; that Harrison procured one C. E. Leapley as purchaser; that the plaintiff visited the property and was there informed that the property was encumbered by a mortgage; that thereafter C. E. Leapley became ill and Harrison undertook to assist plaintiff, wife of C. E. Leapley, in her affairs; that several appointments were made for the purpose of conveying property in question to plaintiff, who had undertaken "to complete the purchase of the property at Tuxedo, Maryland," (page 12 of the record); that settlement was made, to the best of defendant's recollection, on August 23, 1926; that defendant received check for his equity in the property and deed showing that there was an encumbrance against the property was delivered at that time. That at that time plaintiff was fully informed that there was a mortgage on the property and especially warned to be sure that the matter was taken care of; and that plaintiff said that Mr. Harrison was going to attend to the matter for her. That no money other than that represented by the check for his equity came into his possession in connection with the transaction. The record shows that check for balance of purchase price was payable to Harrison as agent. Defendant further testified that the first information he received that the balance of the mortgage was unpaid was in September, 1928.

The Errors Assigned

The plaintiff has assigned four errors (page six of the record). The first and second assignments allege error by the Court below in finding in favor of the defendant because said finding is contrary to the evidence, and because said finding is contrary to the law. The record contains no exception upon which to predicate such assignments of error.

The third assignment of error is predicated upon an exception to the overruling by the trial court of a motion for a new trial. This court has held repeatedly that the overruling of a motion for a new trial forms no basis for a review of the case.

The fourth assignment of error is based on the action of the trial court in giving judgment in favor of defendant, which is purely a perfunctory matter and is not subject to a formal exception, nor is this assignment of error predicated upon an exception.

ARGUMENT

As to Sufficiency of Record

The first point to be considered is the question as to whether or not this case is properly before the Court, and defendant in error here and now renews his motion to dismiss this case. It will be observed from the record in this case that the sole exception noted by the plaintiff in error is the exception to the action by the trial Judge in overruling motion by the plaintiff for a new trial, and that the motion is di-

rected to the sole proposition of securing a new trial to the plaintiff in error.

The Municipal Court Act approved March 3, 1921, (41 Stat. L. Pt. 1, P. 1310) Section 5, provides as follows:

“That if neither party shall demand a trial by jury, or if the value in controversy shall not exceed twenty (\$20.00) dollars, the case may be tried and determined by any judge of the court, and his finding upon the facts, which may be either general or special, shall have the same effect as a verdict of a jury, with the same right of either party to take an exception to any ruling of the court, and have the same embodied in a bill of exceptions, as in case of a jury trial.”

and Section 12 provides in part as follows:

“That hereafter no appeal shall lie from the Municipal Court to the Supreme Court of the District of Columbia. If in any case in the Municipal Court an exception is taken by any party to any ruling or instruction of the court on matter of law the exception shall be reduced to writing and stated in a bill of exceptions with so much of the evidence as may be material to the question or questions raised, and such bill of exceptions shall be settled and signed by the judge within such time as may be prescribed by the rules of said court. Any party aggrieved by any final judgment of said court may seek a review thereof by the Court of Appeals of the District of Columbia by petition under oath setting forth concisely but clearly and distinctly the nature of the proceeding in said court, the trial and judgment therein and the particular ruling or instruction upon matter of law to which exception has been taken, said

petition to be presented to any justice of the Court of Appeals within ten days after the entry of such judgment and with such notice to the opposite party as may be required by rules of said Court of Appeals. If the justice shall be of opinion that such judgment ought to be reviewed a writ of error shall be issued from the Court of Appeals to the Municipal Court which shall send to the Court of Appeals, within such time as may be prescribed by that court, a transcript of the record in the case sought to be reviewed; and the Court of Appeals shall review said record and affirm, reverse, or modify the judgment in accordance with law." * * *

From this it appears that the procedure in the event of a trial by the Court, without a jury, is subject to the same mode of exception to raise a question of law that obtains where the trial of the facts is by a jury.

In conjunction with this, the attention of the Court is invited to the rule that an assignment of error not predicated upon an exception adds nothing to a bill of exceptions. In the case of *Scott vs. Herreld*, 31 App. D. C., page 54, this court said: "The third assignment of error relates to the admission of records in the Assessor's office, but is not predicated upon an exception, and therefore, must be passed."

It follows, therefore, that the assignments of error in this case relate, of necessity, to the single exception taken by the plaintiff in error, or that they are merely surplusage and are to be disregarded, and that the question before the court is whether or not the denial of a motion for a new trial is reversible error.

This Court, in passing upon whether or not a motion for a new trial is subject to review, in the case of Whelan, et al. vs. Welch, et al., 50 App. D. C., page 173, had the following to say, speaking through the late Chief Justice Smyth:

“1. It is asserted that the court erred in overruling a motion for a new trial based on the assumption that the verdict was not sustained by sufficient evidence. According to federal practice this is not assignable as error. Mr. Justice Story, as long ago as *Barr v. Gratz*, 4 Wheat. 213, 220 (4 L. Ed. 553), said that it ‘is too plain for argument that such a refusal affords no ground for a writ of error.’ ”

and here follows a list of cases cited to support the proposition. Continuing, the Court said:

“If appellants desired to raise the question of the sufficiency of the evidence, they should have done so by a request for a peremptory instruction to return a verdict in their favor” (quoting three cases) “but they did not do so. On the contrary, they requested the court to submit the case to the jury, thus impliedly stating that there was a question for the jury’s consideration (quoting cases). They will not now be heard to say that the representation was not correct. (Quoting cases.)

“Appellants refer us to a number of decisions wherein it was ruled that if the testimony is of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition thereto, the case should not be submitted to the jury. Of course that is true. But how must the question be raised, so that it may be examined by a re-

viewing court? Not for the first time by a motion for a new trial, but always by a request for a directed verdict. And that is the manner in which it was presented in the cases cited. None of them countenances the procedure followed here.” * * *

This decision was affirmed in *Phillips v. Moore & Hill, Inc.*, 51 App. D. C. 349, and there are many similar decisions both before and after the cases cited.

In the case of *George vs. Capital Traction*, 54 App. D. C. 144, contention was made in behalf of the defendant in error that the case was presented solely on the exception to the overruling of a motion for a new trial. Examination of the Bill of Exceptions in that case shows that upon completion of plaintiff's case in chief (page 6 of the record in that case) “Counsel for the defendant moved that the case be dismissed and for a finding of fact in favor of the Defendant as the Plaintiff had failed to make out a case of negligence and further, that the contributory negligence of the Plaintiff was apparent from the testimony,” and the record further shows that the trial judge entered a finding of fact in favor of the Defendant without hearing any evidence from the Defendant, to which action and ruling of the Court the Counsel for Plaintiff duly excepted. The record further shows that thereafter a motion for a new trial had been filed and overruled, to which exception was also taken, and this Court speaking through Mr. Associate Justice Smith, held that the two exceptions together gave the Court of Appeals jurisdiction to review the case.

Finding of the Court

The plaintiff electing to go to trial before the court, without a jury, is bound by the finding of fact made by the Court after hearing the testimony. (Sec. 5, Municipal Court Act., Approved March 3, 1921.)

The Trial Court had full opportunity to observe the principal witnesses, and to observe their demeanor on the stand and from long experience was competent to judge the veracity, credibility and memory of those testifying. After a trial of this case, extending over two days, the Court entered its finding for the defendant, and it is submitted, found for the defendant on every issue raised, including a finding that Harrison was the agent of the plaintiff for the purpose of paying off the mortgage, and that the money (\$1,000) which was misappropriated by Harrison was the money of the plaintiff.

Harrison's Relation to the Transaction

The record shows (page 18) that Harrison was employed to procure a purchaser for the property in question. There is nothing to show that he had any further authority, on the contrary testimony of all parties shows that defendant was present at the time of settlement and there acted for himself, and according to his testimony (page 18 of the record) delivered the deed, received check for his equity and warned plaintiff that there was a mortgage which she was to pay off. When plaintiff said Harrison would pay off the mortgage for her, she certainly constituted Harrison her agent. This statement coupled with facts

known by the defendant concerning Harrison's assistance to the Plaintiff were sufficient, even if Harrison had been defendant's general agent, to absolve defendant from any responsibility for Harrison's wrongful appropriation of part of the money entrusted to him by the plaintiff.

Circumstantial Evidence

Great stress is laid by plaintiff on the inference to be drawn from the date of the check payable to Harrison, the date it was cashed and the date of the deed appearing in the record, and inferences are drawn as to the probative value of circumstantial evidence as against direct evidence. Having in mind that the testimony of the Defendant was direct as to the date of the settlement in question and the delivery of the deed to the plaintiff, attention is invited to Greenleaf on Evidence, Fourteenth Edition, Part 1, Chap. III, in discussing the relative weight of direct and circumstantial evidence, on page 21, in the foot-note he says:

“As regards the weight of such evidence when admitted, this question is left, with one restriction, entirely to the jury, just as the question of the weight of direct testimony is left to them. The jury are not bound to believe any witness, nor are they bound to be convinced by any given amount of circumstantial evidence. No doubt there are reasons why certain kinds or amounts of circumstantial evidence vary greatly in probative force, but there is no rule of law requiring a jury to convict on the stronger evidence, or to acquit on the weaker. The whole subject is left entirely in their hands * * *. Neither is there any

rule of law in regard to the weight to be given by the jury to circumstantial evidence when it is opposed to direct evidence. There is no sort of difference in the kind of probative force of the different kinds of evidence, whether the comparison is made between weak cases or strong ones. * * * The jury are at liberty to believe whatever evidence seems to them credible; * * * and the circumstantial evidence may outweigh the direct evidence. The single restriction put upon the jury by the law in regard to their verdict is the one which governs also cases of direct testimony and is that, (1) in civil cases their verdict should not be for the party on whom lies the burden of proof unless the preponderance of the evidence is in his favor; and (2) criminal cases * * *

Thus, the evidentiary value of the testimony, both direct and circumstantial, concerning the date on which the settlement in question was made and whether or not the deed was there delivered, was a question of fact for the trier of the facts.

Assuming for the sake of argument that the probative value of the circumstantial evidence given by the dates on instruments in question is to be given greater weight than the direct testimony of Defendant as to the date of settlement, yet even then the circumstances of the dates in question does not preclude the possibility of the delivery of the deed at the time of settlement whenever it may have occurred, as for instance, if settlement had occurred in the early evening on August 20th, the date on which the deed in question was acknowledged and could have been delivered, the check to Harrison might still have been cashed on August 20th, as nowhere was the proposition that the bank was not

open on the evening of this day shown. It is common knowledge that banks for purposes of their own often remain open in the evening for the transaction of business and to a somewhat later hour than about dark.

Dealing further with the situation claimed by plaintiff by reason of the dates in question, attention is invited to the fact that deposition by the witness Harrison was taken in advance of trial (page 15 of the record) and that the cancelled checks payable to Harrison and the Defendant were in the possession of the Plaintiff and were produced at the trial of the case by her, and that the date on which check payable to Defendant was actually paid by the bank on which it was drawn was consistent with his testimony, and that several engagements had been made for the settlement before the settlement was actually made. All of these facts indicate that the matter of claimed discrepancy between date of the check and the date the settlement was made and deed passed were matters peculiarly within the knowledge of the plaintiff, and a situation which could best be explained by Harrison. But does the Plaintiff permit the slightest indication of this to appear during the time Harrison was available and could have been questioned? If the check payable to Harrison had been drawn up and signed at a time prior to the actual settlement who would know about it other than Harrison or the plaintiff?

The record (page 2) shows that in her declaration, the plaintiff alleges:

“That thereafter, on, to wit, the 19th day of August, 1926, the said C. E. Leapley being at that time confined to a hospital, the plaintiff, his wife,

undertook to and did pay to the said defendant or his authorized agent, the sum of Six thousand six hundred ninety dollars and eighty-seven cents, (\$6,690.87), that being the total amount necessary to consummate said contract, at that time, and the defendant executed to and delivered to the plaintiff a deed for said property.”

Under the well recognized rules of pleading it is to be taken that the deed in question passed at the time of the payment, and that if plaintiff expected to prove, or to be permitted to prove, a different date, the pleading should have been in more appropriate language.

It is submitted that by this pleading, even if the plaintiff did not estop herself to deny that the deed had passed at the time of settlement, which defendant does not admit, that at least she, with considerable art, concealed a situation upon which she now seeks to rely.

Probability of Plaintiff's Claim

To believe the Plaintiff's story of what transpired at the time of settlement for the Tuxedo property seems difficult. From her testimony it appears that the only thing that occurred was the passing of the checks which have been admitted in evidence. She denies that the encumbrance was discussed, that any settlement figures were made or that any deed passed. Yet the record shows that she had previous experience in real estate dealing, and that even then she was having trouble in connection with the settlement of the sale of her Central Avenue property. With this experience as a background, she would now have the

Court believe that she signed two checks aggregating over \$6,000.00, with never a word as to what she was getting for the checks she was passing, and apparently no curiosity as to why two checks were being signed.

Plaintiff's Delay in Complaining

The attention of the Court is further invited to the delay in making any complaint concerning the non-payment of the encumbrance. The settlement in question occurred during August, 1926, and according to Harrison's testimony he had conversation with the Plaintiff within six months concerning this unpaid balance. The Plaintiff denies the conversation with Harrison, but she does admit that she was told in September, 1927, that the encumbrance was unpaid, and yet she does not deny that nothing was said to the Defendant about the matter until September, 1928. Isn't the inference from this that she considered Harrison her agent for the purpose of paying off the encumbrance, and that it was not until some time later that she conceived the idea of making him Defendant's agent and trying to hold the Defendant for the unpaid balance?

Plaintiff in her brief makes a point of the fact that the warranty of the deed recites an incumbrance of \$4,000.00, whereas in fact the encumbrance was a smaller one. The recital in the deed is of the amount of the original encumbrance as of record, and how the fact that the encumbrance was in fact smaller at that time gives the plaintiff any ground for complaint is not apparent.

Plaintiff also makes much of the fact that the contract between defendant and C. E. Leapley recites the terms of the contract as "All cash." This contract, it is submitted, has nothing to do with the case and was admitted over defendants objection and exception. But it is singular that plaintiff contends that this contract could be changed so as to make her a party, but could not be changed in any other respect. She apparently argues that she bought the property and therefore was a party to the contract, but contends that notwithstanding that the warranty of the deed shows that property was encumbered, no change could have been made in the contract. It is submitted that this contract, even if of a nature to enable her to sue thereon, was merged in the deed which was delivered.

Application of Babson vs. Cox

The Plaintiff relies strongly upon the case of Babson vs. Cox, 32 App. D. C. 542, an equity case, claiming that the situation in that case is almost identical with the present case. The points of difference between the case cited and the present case are:

1. On the question of agency in Babson vs. Cox the trial court held that the testimony did not sustain the sellers' contention that the purchaser made the real estate agents (Martin Brothers) his agents for the purpose of paying off the existing encumbrance on the property: Whereas, in the case here, the trial court necessarily found as a fact that the purchaser (plaintiff herein) constituted the real estate agent (Harrison) her agent for the purpose of paying off the en-

cumbrance. And it is submitted that there was ample testimony justifying the holding in this case.

2. Further with reference to agency, in Babson vs. Cox it was held that the real estate agent was the agent of the seller as shown by the fact that the seller had entrusted executed deed to the property for delivery to the purchaser, and that the real estate agent was empowered to receive the purchase price by reason of having been entrusted with the deed for delivery; and further that the special warranty made it the duty of the seller to pay off the encumbrance; Whereas, in this case, the seller was present at the settlement to represent himself, and himself delivered the deed (although plaintiff contends that no deed was delivered), and there was no special warranty against encumbrance, in fact the fact of encumbrance was not only shown by the deed, but the seller especially told purchaser about it at time of settlement.

3. On the question of warranty in Babson vs. Cox, the Court of Appeals said that by the terms of his special warranty the seller was obligated to discharge the encumbrance; Whereas, in the case here, the deed of conveyance specifically says: "that they have done no act to encumber said land; excepting, a first Mortgage for the amount of Four Thousand Dollars, as of record," thus putting the purchaser on notice that there was an encumbrance.

CONCLUSION

In conclusion, the Defendant in Error submits that there is not a sufficient point of law raised in the rec-

ord to empower this Honorable Court to review the case;

That the Plaintiff having elected to go to trial without a jury is bound by the finding of fact by the trial court and that every intendment should be held and construed in favor of said finding;

And that the evidence, on the whole, is amply sufficient to justify the finding of fact by the trial court.

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